

DOCKET FILE COPY ORIGINAL
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the Telecommunications)	CC Docket No. 96-115
Act of 1996:)	
)	
Telecommunications Carriers' Use of)	
Customer Proprietary Network Information)	
and Other Customer Information)	
)	
)	
Implementation of the Non-Accounting)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the)	
Communications Act of 1934, as amended)	

To: The Commission

**REPLY TO OPPOSITIONS TO AND COMMENTS ON
PETITIONS FOR RECONSIDERATION OR CLARIFICATION**

Celpage, Inc. ("Celpage"), by its attorneys and pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405 (the "Act"), and Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g), hereby respectfully submits this Reply to the oppositions and comments (collectively, the "Comments") filed concerning the Petitions for Reconsideration (the "Petitions") in the Second Report and Order and Further Notice of Proposed Rule Making in the above referenced proceeding (the "CPNI Order").¹ In support hereof, the following is respectfully shown:

**I. The Prohibition Against CPNI Use for CPE and Information
Services Marketing Should be Reconsidered.**

The Comments overwhelmingly support the Petitions seeking reconsideration (or forbearance) of the prohibition against a carrier's use of CPNI in connection with marketing

¹ FCC 98-27 (released February 26, 1998).

"customer premises equipment" (CPE") and information services to its own customers, at least insofar as the rule applies to Commercial Mobile Radio Service ("CMRS") carriers. See, e.g., Comments of Bell Atlantic Mobile, Inc. Supporting Petitions for Forbearance ("BAM Comments"); Arch Communications Group Comments in Support of CMRS Petitions for Reconsideration and/or Forbearance ("Arch Comments") at 3-4; AT&T Opposition to and Comments on Petitions for Reconsideration ("AT&T Comments") at 5-9. Cf. GTE Comments/Opposition to the Petitions for Reconsideration ("GTE Comments") at 3-8. Even parties who generally oppose the use of CPNI in connection with CPE and information services agree that, due to the unique nature of CMRS services, restrictions on such uses by CMRS carriers are inappropriate. See Opposition of MCI Telecommunications Corporation to Petitions for Reconsideration and Forbearance ("MCI Opposition") at 24-25. Celpage urges the Commission to reconsider its treatment of CMRS CPE and information services in light of the great weight of evidence in this proceeding.

As the parties have observed, CPE is an integral part of providing a CMRS service, and indeed, is part of the carrier's Title III radio license. Arch Comments at 4. Moreover, CMRS CPE is practically as well as legally inseparable from the carrier's licensed telecommunications service: a pager or handset must be programmed so that it can receive on the specific carrier's assigned frequency, and is otherwise compatible with the carrier's network, in order for the subscriber to receive service. See, e.g. AT&T Comments at 6-7.

CMRS CPE is also indistinguishable from the underlying telecommunications service in customers' minds. As several of the Petitioners demonstrated, and as Bell Atlantic Mobile's Comments show in detail, artificial distinctions between CMRS telecommunications services and

CPE run counter to established consumer expectations, and will in fact harm consumers by decreasing efficient provision of CMRS services. BAM Comments at 4-5, 7, 11-13. The Commission's CPNI rules will also hamper efforts to rapidly and efficiently deploy new CMRS technologies; for example, various CMRS parties have noted the difficulty posed in marketing digital services to subscribers, if at the same time they cannot inform those subscribers that a new digital handset will be needed to receive the services. See, e.g. AT&T Comments at 6-7.

Similarly, CMRS "information services" have traditionally been bundled with CMRS telecommunications services, and subscribers consider that combined package as the "service" to which they subscribe. Customer expectations, which the Commission has found to be the appropriate guiding principle for adopting CPNI restrictions, are that their CPNI will be used to offer them new service options, without regard to any regulatory distinction between "information" and "telecommunications" services. As Bell Atlantic Mobile notes, the only customer complaints generated by CMRS bundling of information services arise when a carrier fails to inform customers of the availability of information services, such as voice mail, that may be usefully integrated into their existing CMRS services. BAM Comments at 12-13.

For the reasons stated in its Petition, Celpage concurs with the parties to this proceeding that, at least in the CMRS context, restrictions on CPNI use for CPE and information services marketing are not required by the statute, and undermine consumer expectations and preferences.

Celpage, like every CMRS carrier in the nation, has long combined the provision of telecommunications services with the provision, maintenance and repair of the equipment necessary to receive those services. Since properly programmed equipment is necessary to receive a CMRS service at all, a CMRS carrier must be able to inform customers about their

equipment options, and the use of "network information" specific to the particular service is essential. To reiterate the example used by several parties, it would hardly serve customers' interests for a carrier to market new digital services to a subscriber, without informing the subscriber that the analog handset he/she currently uses will not work with the new service. Similarly, a paging carrier marketing regional service to a subscriber, on a different frequency than the subscriber's existing local service, would not be providing full customer service if it failed to inform the subscriber that his/her pager might need to be replaced or reprogrammed.

Although, unlike CPE, information services are not absolutely necessary for a customer to receive CMRS telecommunications services, customers consider those information services as part of their "total" CMRS service, and information services are certainly "used in" the provision of CMRS telecommunications within the meaning of Section 222. "Information services" such as voice mail are perceived by customers as valuable components of their mobile service; from the customer's perspective, "information" and "telecommunications" services are not nearly so distinct as the Commission's new regulatory structure suggests

The Commission should not blithely eliminate the long-standing, integrated marketing and rendering of CMRS telecommunications, information services and equipment. Consumers have relied for years on the use of CPNI for more efficient bundling of CMRS services and equipment, as carriers in this intensely competitive industry have vied to provide consumers with better-tailored service packages at lower prices. Absent a statutory mandate requiring abandonment of business practices that have served carriers and their customers well for many years, the Commission should not disturb the workings of the competitive CMRS market. And as the parties to this proceeding have demonstrated, Section 222 does not embody such a statutory

mandate.

As the Commission correctly found in adopting its "total service" approach to CPNI use, Section 222 seeks to protect not only customer privacy, but also customer control and convenience. The Commission also correctly found that customers expect their carriers to access CPNI in connection with the provision of services to which the customer already subscribes. Customer expectations are thus the touchstone of Section 222, and the determination of which services fall within the "total service" to which the CMRS customer subscribes should be based not on artificial regulatory distinctions developed in the context of monopoly wireline services, but on the customers' perceptions of what constitutes their subscribed "service." As the parties have amply demonstrated, CMRS CPE and information services are an integral part of what customers perceive as their "total service." The Commission should reconsider its CPNI rules to protect those customer expectations.

II. CPNI Use Should be Permitted for Win-Back Efforts.

The Comments overwhelmingly support reconsideration of the prohibition on CPNI use to win back departing customers -- at least insofar as that prohibition applies to competitive carriers. See, e.g., MCI Comments at 15; AT&T Comments at 3-5; Opposition and Comments of Sprint Corporation ("Sprint Comments") at 1-4; Arch Comments at 4-5. As stated in its own comments, Celpage agrees with the compelling record evidence that the Commission's anti-"win back" rule is not required by Section 222 and will have anti-competitive effects that harm both carriers and consumers.

As the parties have observed, there is no language in Section 222 that requires the Commission to ban "win-back" efforts. See, e.g., Sprint Comments at 2; AT&T Comments at 4.

Congress was surely aware that in the telecommunications industry, as in all other industries, a service provider who has lost (or is on the verge of losing) a customer will use information from that customer's account to try to regain (or retain) that customer, yet, Section 222 is silent on this issue. If Congress had intended to ban such a common, long-standing business practice, it seems that it would have said so directly.

Since, as the parties have shown, the anti-"win-back" rule is not statutorily mandated, the Commission should reconsider that anti-competitive rule provision. The record in this proceeding demonstrates the harm that the anti-"win-back" rule will cause, not only to carriers, but to consumers. The direct competition over service options and price that occurs when a carrier tries to keep a defecting customer benefits consumers by allowing them to choose the most useful mix of services at the lowest price; those benefits of competition will be lost under the Commission's new CPNI rules. See, e.g., BAM Comments at 15-16; AT&T Comments at 3-4; Sprint Comments at 1; GTE Comments at 9.

Particularly in the already-competitive CMRS marketplace, the Commission's "win-back" prohibition will result in customer service that is inferior to that which customers have traditionally enjoyed. As economics professor Dr. Jerry A. Hausman stated in his Declaration to Bell Atlantic Mobile's Comments, the "win-back" prohibition "is particularly harmful to the public interest, because it leads to higher prices, decreased competition, and discourages CMRS carriers from making the up-front investment in attracting customers that has stimulated the growth of CMRS." BAM Comments at Exhibit 1, p. 9.

A customer changing carriers does not automatically get the "best deal" for his or her needs; if the incumbent carrier, using the customer's records, can provide a better-tailored service

package at a better price than the customer's prospective service provider(s), the customer will continue (or resume) service with the first carrier. Conversely, if the current (or former) carrier cannot meet the service options offered by the competing carrier(s), the current (or former) carrier's "win-back" efforts will fail.² In either case, the customer benefits by obtaining sufficient information from the competing carriers to choose the services that best meet his or her needs, at the best available price.

The FCC's regulations also may impermissibly restrict protected commercial speech. There can be little doubt that the free flow of information between a carrier and its customers is protected under the First Amendment. See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 561 (1980) (the First Amendment "protects commercial speech from unwarranted government regulation"). The FCC does not appear to have considered the First Amendment implications of its rules, or whether there may be less restrictive means of meeting the consumer protection and pro-competitive goals it is trying to serve. See, e.g., ACLU v. Reno, 117 S.Ct. 2329, (1997) (First Amendment requires "precision" when content of speech is regulated; restrictions on speech are "unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes"); Central Hudson, 447 U.S. at 564 ("the restriction [on commercial speech] must directly advance the state

² While a new carrier seeking a consumer's business can ask that consumer about his or her specific communications needs, that consumer undoubtedly expects his/her current carrier to know about when, where, how often and at what rate the customer makes use of his/her existing service. The current carrier can therefore not market to a defecting customer as though their customer-carrier relationship never existed, if it is to have any hope of retaining that customer. See, e.g., Sprint Comments at 3, n. 1. Rather than be grateful for the presumed "protection" of their "privacy," defecting customers are likely to assume that such a carrier either keeps rather poor records, or simply does not value their business enough to present a well-targeted counter-offer.

interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose" and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive"). In light of the First Amendment concern that consumers be "well enough informed" about their commercial options, Central Hudson at 562; and the abundant record evidence that the anti-"win-back" rule promotes none of the Commission's goals in this proceeding, that rule may well violate the First Amendment rights of carriers *and* their customers. Id. at 562-564.

The availability of better services at lower prices are the primary benefits of competition, but, the Commission's "win-back" prohibition interferes with the competitive conditions that make those benefits to consumers possible. Since there is no statutory requirement for prohibiting "win-back" use of CPNI, or any other compelling justification to balance the harms that the "win-back" prohibition will cause, the Commission should grant the Petitions, and reconsider its adoption of that prohibition, or alternatively, forbear from enforcing it against CMRS carriers.

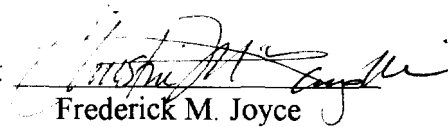
Conclusion

For the reasons stated in its Petition and the foregoing reasons, Celpage respectfully requests that the Commission reconsider or clarify certain portions of its CPNI Order.

Respectfully submitted,

CELPAGE, INC.

By:



Frederick M. Joyce
Christine McLaughlin

Its Attorneys

JOYCE & JACOBS, Attorneys at Law, L.L.P.
1019 19th Street, N.W.
Fourteenth Floor -- PH2
Washington, DC 20036
(202) 457-0100

July 6, 1998

CERTIFICATE OF SERVICE

I, Christine McLaughlin, Esq., do hereby certify that the foregoing Reply to Oppositions to and Comments on Petitions for Reconsideration or Clarification, was served, on this 6th day of July, 1998, by first class U.S. mail, postage prepaid upon the following:

The Honorable William E. Kennard *
Chairman
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

The Honorable Susan Ness *
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, DC 20554

The Honorable Harold Furchtgott-Roth *
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20554

The Honorable Michael Powell *
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554

The Honorable Gloria Tristani *
Commissioner
Federal Communications Commission
1919 M Street, NW, Room 826
Washington, DC 20554

A. Richard Metzger, Jr. *
Chief, Common Carrier Bureau
1919 M Street, N.W.
Room 500
Washington, DC 20554

John T. Scott, III
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Cleveland Lawrence, III
Michael Altschul
Randall S. Coleman
Cellular Telecommunications Industry Assn.
1250 Connecticut Avenue, NW, Suite 200
Washington, DC 20036

Mark C. Rosenblum
Judy Sello
AT&T Corp.
295 North Maple Avenue, Room 324511
Basking Ridge, NJ 07920

Howard J. Symons
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo,
PC
701 Pennsylvania Avenue, N.W.
Washington, DC 20004

Glenn S. Rabin
ALLTEL Communications, Inc.
655 15th Street, N.W.
Suite 220
Washington, DC 20005

S. Mark Tuller, V.P., Secretary and General
Counsel
Bell Atlantic Mobile, Inc.
180 Washington Valley Road
Bedminster, NJ 07921

Gail L. Polivy
GTE Service Corp.
1850 M Street, NW, Suite 1200
Washington, DC 20036

James J. Halpert
Mark J. O'Connor
Piper & Marbury, LLP
7th Floor
1200 19th Street, N.W.
Washington, DC 20036

Stephen G. Kraskin
Sylvia Lesse
Marci E. Greenstein
Kraskin, Lesse & Cosson, LLP
Suite 520
2120 L Street, N.W.
Washington, DC 20037

Lawrence W. Katz
Bell Atlantic Telephone Companies
8th Floor
1320 North Court House Road
Arlington, VA 22201

Frank W. Krogh
Mary L. Brown
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

Robert M. Lynch
Durward D. Dupre
Michael J. Zpevak
Robert J. Gryzmala
SBC Communications, Inc.
175 E. Houston, Room 1258
San Antonio, TX 78205

Kathryn Marie Krause
Daniel L. Poole
US WEST Communications, Inc.
1020 19th Street, NW, Suite 700
Washington, DC 20036

Joseph R. Assenzo
Sprint Spectrum, LP d/b/a Sprint PCS
12th Floor
4900 Main Street
Kansas City, MO 64112

Cheryl A. Tritt
James A. Casey
Morrison & Foerster, LLP
Suite 5500
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

Robert Hoggarth, Senior V.P., Paging and
Messaging
Personal Communications Industry Assn.
500 Montgomery Street
Suite 700
Alexandria, VA 22314

David R. Goodfriend
Willkie, Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20036

Pamela J. Riley
David A. Gross
AirTouch Communications, Inc.
1818 N Street, NW
Suite 800
Washington, DC 20036

Peter M. Connolly
Koteen & Naftalin
1150 Connecticut Avenue, NW
Washington, DC 20036

M. Robert Sutherland
A. Kirven Gilbert, III
BellSouth Corporation
Suite 1700
1155 West Peachtree Street, NE
Atlanta, GA 30309

R. Michael Senkowski
Michael Yourshaw
Gregory J. Vogt
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Michael S. Pabian
Ameritech Operating Companies
2000 West Ameritech Center Drive
Room 4H82
Hoffman Estates, IL 60196

L. Marie Guillory
Jill Canfield
National Telephone Cooperative Association
2626 Pennsylvania Avenue, N.W.
Washington, DC 20037

Raymond G. Bender, Jr.
J.G. Harrington
Kelli Jareaux
Dow Lohnes & Albertson, PLLC
Suite 800
1200 New Hampshire Avenue, N.W.
Washington, DC 20036

Michael F. Finn
Association of Directory Publishers
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20036

Linda Kent
Keith Townsend
Lawrence E. Serjeant
USTA
Suite 600
1401 H Street, N.W.
Washington, DC 20005

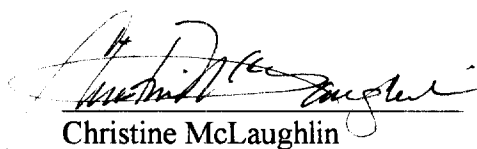
William L. Roughton, Jr.
PrimeCo Personal Communications, LP
601 13th Street, NW
Suite 320 South
Washington, DC 20005

John F. Raposa
GTE Service Corporation
HQE03J27
600 Hidden Ridge
Irving, TX 75038

ITS, Inc. *
1231 20th Street, NW
Washington, DC 20554

Leon M. Kestenbaum
Jay C. Keithley
Michael B. Fingerhut
Sprint Corporation
1850 M Street, N.W., 11th Floor
Washington, DC 20036

Jonathan E. Canis
Melissa M. Smith
Kelley, Drye & Warren, LLP
1200 19th Street, N.W., Suite 500
Washington, DC 20036



Christine McLaughlin

* Denotes hand-delivery